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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MARK EDWARD DAWES, GARY VICTOR RHOADES, and  
STEPHEN WILLIAM SANKEY

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Appeal 2009-004261  
Application 10/502,473  
Technology Center 1700

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Decided: March 12, 2010

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Before EDWARD C. KIMLIN, BRADLEY R. GARRIS, and  
ADRIENE LEPIANE HANLON, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-10, 15-23, and 37-54. We have jurisdiction under 35 U.S.C. § 6.

We REVERSE.

Appellants claim an open-ended tube comprising a multi-layer polymeric film having certain characteristics, “wherein said multi-layer film comprises a plurality of separating means which enable one multi-layer portion of said film to be separated from an adjacent multi-layer portion of said film” (claim 1; Figure 4).

Representative claim 1, the sole independent claim on appeal, reads as follows:

1. An open-ended tube comprising walls of a heat-sealable multi-layer polymeric film, wherein said film comprises an outer shrinkable substrate layer and an inner heat-sealable layer, wherein said substrate layer has a degree of shrinkage in a longitudinal dimension of the tube of about 0% to about 50% when heated from ambient temperature to a temperature in the range of 55 to 100°C, and a degree of shrinkage in a transverse dimension of the tube of about 5 to about 70% when heated from ambient temperature to a temperature in the range of 55 to 100°C, wherein said multi-layer film comprises a plurality of separating means which enable one multi-layer portion of said film to be separated from an adjacent multi-layer portion of said film.

The references set forth below are relied upon by the Examiner as evidence of obviousness:

Hart	5,130,189	Jul. 14, 1992
Meilhon	6,105,776	Aug. 22, 2000
Boyce	WO 99/62982	Dec. 09, 1999
Kendig	WO 01/54886 A1	Aug. 02, 2001

Under 35 U.S.C. § 103(a), the Examiner rejects claims 1-6, 10, 15-18, and 21-23 as being unpatentable over Kendig in view of Meilhon and correspondingly rejects the remaining claims on appeal over these references in various combinations with Boyce and Hart.

In rejecting representative claim 1, the Examiner acknowledges that “Kendig fails to teach that the packaging film is formed into an open-ended tube or that it comprises a plurality of separating means which enable one multi-layer portion of said film to be separated from an adjacent multi-layer portion of said film” (Ans. para. bridging 3-4). Nevertheless, the Examiner concludes that “it would have been obvious to one having ordinary skill in the art at the time Appellant’s invention was made to wrap the heat shrink packaging film of Kendig completely around the object to be contained forming an open ended tube and to form the film with multiple zones of weakness to permit easy access to the object contained within the film, as taught by Meilhon” (*id.* at 4).

Appellants dispute the Examiner’s obviousness conclusion regarding the “separating means” limitation of independent claim 1 (Br. 7). Appellants explain that Meilhon’s film 3 exhibits a preferred direction of tearing D which is perpendicular to the linear array of perforations in zone A, whereby finger pressure in zone A ruptures the film to initiate a tongue J which is pulled in the direction of arrow T1 or T2 along the preferred tearing direction D in order to open the film via a resulting strip K (*id.* at 6; *see also* Meilhon col. 3, ll. 21-49, col. 4, ll. 41-62, Figures 1-2). Appellants argue that “[the] film claimed and the film shown in Kendig does not exhibit a preferred tearing direction that can be used to advantage, so that inclusion of the perforations of Mielhon to the film of Kendig would not result in ‘separating means’ as claimed” (*id.* at 7).

We agree with Appellants’ interpretation of Meilhon and with Appellants’ point that opening (i.e., separating) this film depends upon the fact that the film exhibits a preferred direction of tearing D. The Examiner

does not disagree with Appellants on this matter. Significantly, the Examiner also does not disagree with Appellants' statement that "the film shown in Kendig does not exhibit a preferred tearing direction" (Br. 7). This is significant because an artisan would have recognized that the opening or separating feature taught by Meilhon relies on the film exhibiting a preferred tearing direction D and therefore the artisan would not have been motivated to provide Mielhon's opening or separating feature in a film which does not exhibit a preferred tearing direction D such as the film of Kendig. On this record, the Examiner has given no reason why an artisan would have been motivated to provide Meilhon's opening or separating feature in the film of Kendig when this film lacks the preferred tearing direction required by Meilhon.

Under these circumstances, Appellants have revealed harmful error in the Examiner's rejection of representative independent claim 1. Accordingly, we do not sustain the § 103 rejection of this claim or the § 103 rejections of the remaining dependent claims on appeal.

The decision of the Examiner is reversed.

REVERSED

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